A

GHAZALEE KASSIM & ORS

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
RAUS SHARIF JCA
ZAINUN ALI JCA
[CRIMINAL APPEAL NOS: J 05-7, J 05-8 & J 05-9-2007]

C

22 MAY 2008

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Appeal against conviction and sentence - Delay - Failure to call informer - Whether still an offence to traffic in cannabis*

D

after Dangerous Drugs (Amendment of First Schedule) Order 1996 deleted "cannabis (Indian Hemp)" from Part III of First Schedule

CRIMINAL PROCEDURE: *Trial - Prima facie case - Lapse of four years and five months from date trial court reserved judgment at close of prosecution's case to date of finding of prima facie case - Whether delay*

E

per se rendered convictions and sentences unsafe - Whether right to fair trial compromised

CRIMINAL PROCEDURE: *Trial - Close of prosecution's case - Lapse of four years and five months from date trial court reserved*

F

judgment at close of prosecution's case to date of finding of prima facie case - Whether delay per se rendered convictions and sentences unsafe - Whether right to fair trial compromised

EVIDENCE: *Witness - Failure of prosecution to call informer as witness*

G

- Whether witness an agent provocateur or mere informer - Whether adverse inference under s. 114(g) Evidence Act 1950 could be invoked against prosecution

EVIDENCE: *Adverse inference - Whether presumption arose - Failure*

H

to call informer as witness - Whether there was withholding or suppression of evidence - Whether adverse inference could be invoked against prosecution - Evidence Act 1950, s. 114(g)

EVIDENCE: *Agent provocateur - Informer, distinguished from - Failure of prosecution to call witness - Whether witness an agent provocateur or*

I

mere informer

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Appeal against conviction and sentence - Definition of cannabis - Whether synonymous with Indian Hemp - Deletion of "cannabis (Indian Hemp)" from Part III of First Schedule by Dangerous Drugs (Amendment of First Schedule) Order 1996 - Whether still an offence to traffic in cannabis - Dangerous Drugs Act 1952, s. 2*

EVIDENCE: *Expert evidence - Chemist - Definition of cannabis - Evidence of chemist that drug trafficked in could be described as "cannabis (Indian Hemp)" and that Indian Hemp a synonym of cannabis - Whether trafficking in Indian Hemp still an offence under s. 39B(1)(a) Dangerous Drugs Act 1952*

These three related appeals by the appellants were against their conviction by the High Court on a charge of trafficking in 50,650gm of cannabis, punishable under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('Act'), and their sentence to death. Pursuant to submissions by the appellants, the following questions required determination: (i) where there was a lapse of four years and five months from the date the trial court had reserved judgment at the close of the prosecution's case to the date of finding a *prima facie* case, could the delay *per se* be construed as having rendered unsafe the convictions and sentences arrived at by the trial court after the close of the defence case?; (ii) was the failure to call the informer, one Ah Meng, fatal to the case for the prosecution?; and (iii) pursuant to the Dangerous Drugs (Amendment of First Schedule) Order 1996 ('amendment order') which deleted, *inter alia*, "cannabis (Indian Hemp)" from Part III of the First Schedule, is it still an offence under s. 39B(1)(a) of the Act to traffic in cannabis when cannabis is synonymous with Indian Hemp?

Held (dismissing the appeals)
Per Low Hop Bing JCA delivering the judgment of the court:

(1) The trial judge's grounds of judgment leading to the finding of a *prima facie* case covered a total of 63 pages, and embraced a maximum evaluation and appreciation of the evidence adduced right up to the close of the prosecution's case. There was also a detailed discussion on the opening statement, the chemist's testimony and analysis, the law of drug trafficking, the burden and standard of proof, the defence's contention as to whether the exhibits in question were cannabis as defined

in s. 2 of the Act, whether it was an offence under s. 39B(1)(a) of the Act and the various roles undertaken by the appellants in the entire episode as revealed in the evidence of the prosecution's witnesses. In reality, the trial court's maximum evaluation and appreciation of the prosecution's evidence signified an embarkation on a meticulous exercise in the consideration process before arriving at the finding that there was a *prima facie* case for the appellants to answer. Further, the learned judge had not occasioned any loss of audio-visual advantage, nor was there any omission on his part to consider crucial issues relevant to the case; less so any compromise of the appellants' rights to a fair trial. In the circumstances, the answer to (i) was in the negative. (paras 26, 27 & 28)

(2) The trial court had arrived at the correct finding that Ah Meng was a mere informer and not an agent provocateur, and had also carefully considered the defence's contention in this regard. There was no non-direction on the part of the trial court and so there was no miscarriage of justice at the trial. *Ti Chuee Hiang v. PP* (dist). The unchallenged evidence adduced in the trial court revealed that the prosecution had made an attempt to bring Ah Meng to court as a witness but it was a fruitless exercise. The prosecution had merely failed to obtain evidence. There was no withholding or suppression of evidence and, hence, no adverse inference could be invoked against the prosecution under s. 114(g) of the Evidence Act 1950. Therefore, the answer to (ii) was in the negative. (para 40)

(3) Although the amendment order in effect brings about the deletion of "cannabis (Indian Hemp)" in Part III, it keeps "cannabis" intact as it is retained in both Part I and Part II and it is a dangerous drug as defined in s. 2 of the Act. The chemist's evidence that the drug in question could be described as "cannabis (Indian Hemp)" or that Indian Hemp was a synonym of cannabis had negated the defence's contention that trafficking in Indian Hemp was not an offence under s. 39B(1)(a) of the Act. The fact that Indian Hemp is cannabis or is synonymous with cannabis and *vice versa* had neither been doubted nor disputed by the defence at all. Indeed, it had been assiduously advanced for the defence by way of cross-examination of the chemist. As cannabis has

been expressly listed in both Part I and Part II and is a dangerous drug under s. 2 of the Act, the act of trafficking in cannabis – which is synonymous with Indian Hemp – clearly constitutes an offence under s. 39B(1)(a) of the Act with which the appellants had been charged. Hence, the answer to (iii) was in the affirmative. *PP v. Md Alim Samad* (ovrd); *PP v. Roselang Abdul Rahman* (ovrd); *PP v. Shee Chin Wah* (foll). (paras 42, 43, 56, 57, 58 & 59)

Bahasa Malaysia *Translation Of Headnotes*

Ketiga-tiga rayuan perayu-perayu yang saling berkaitan di sini adalah terhadap keputusan Mahkamah Tinggi kerana mensabitkan mereka atas pertuduhan mengedar 50,650gm cannabis di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'), dan menjatuhkan hukuman mati ke atas mereka. Ekoran hujahan yang dibuat oleh perayu-perayu, persoalan-persoalan berikut telah berbangkit untuk pemutusan, iaitu: (i) di mana terdapat kelengahan empat tahun dan lima bulan dari tarikh mahkamah bicara menangguhkan keputusan di akhir kes pendakwaan hingga ke tarikh mahkamah membuat dapatan kes *prima facie*, bolehkah kelengahan sedemikian *per se* dianggap sebagai telah menyebabkan sabitan dan hukuman yang dibuat oleh mahkamah di akhir kes pembelaan tidak selamat? (ii) adakah kegagalan memanggil informer, seorang Ah Meng, memudaratkan kes pendakwaan?; dan (iii) mengambilkira Perintah Dadah Berbahaya (Pindaan Jadual Pertama) 1996 ('perintah pindaan') antara lain telah memadamkan "cannabis (Indian Hemp)" dari Bahagian III Jadual Pertamanya, adakah ia masih menjadi satu kesalahan di bawah s. 39B(1)(a) Akta untuk mengedar cannabis sedangkan cannabis adalah sinonim dengan Indian Hemp?

Diputuskan (menolak rayuan-rayuan)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Alasan penghakiman yang arif hakim yang membawa kepada dapatan kes *prima facie* mengandungi 63 mukasurat semuanya dan telah menyerlahkan penilaian maksima dan apresiasi terhadap keterangan-keterangan yang dikemukakan hingga ke akhir kes pendakwaan. Terdapat juga perbincangan terperinci terhadap kenyataan pembukaan, testimoni dan analisa ahli kimia, undang-undang pengedaran dadah, beban dan standard pembuktian, hujah pembelaan mengenai sama ada eksibit-eksibit

berkenaan adalah cannabis seperti yang ditafsirkan di dalam s. 2 Akta dan sama ada ianya satu kesalahan di bawah s. 39B(1)(a) Akta serta peranan-peranan yang dimainkan oleh perayu-perayu dalam keseluruhan episod seperti yang terdedah dari keterangan saksi-saksi pendakwaan. Pada hakikatnya, penilaian maksima dan apresiasi yang dibuat oleh mahkamah bicara terhadap keterangan pendakwaan menunjukkan satu proses pertimbangan yang amat berhati-hati sebelum mencapai dapatan kes *prima facie* yang perlu dijawab oleh perayu. Selain itu, yang arif hakim tidak menanggung apa-apa kehilangan manfaat audio-visual, dan tidak mempamerkan apa-apa kegagalan untuk menimbang isu-isu yang relevan kepada kes; lebih-lebih lagi untuk berkompromi dengan hak perayu-perayu terhadap satu perbicaraan yang adil. Dengan hal yang demikian, jawapan kepada (i) adalah berbentuk negatif.

(2) Mahkamah bicara telah mencapai dapatan yang betul bahawa Ah Meng hanyalah seorang informer dan bukan seorang agent provocateur, dan telah menimbang dengan cermat hujah pembelaan mengenai persoalan ini. Tidak terdapat apa-apa salah arahan di pihak mahkamah bicara dan oleh itu tidak berlaku apa-apa salah laksana keadilan di perbicaraan. *Ti Chuee Hiang v. PP* (dibezakan). Keterangan tidak dicabar yang dikemukakan di mahkamah bicara menunjukkan bahawa pendakwaan telah membuat percubaan untuk membawa Ah Meng ke mahkamah sebagai seorang saksi tetapi tidak berjaya. Pendakwaan hanya gagal untuk memperoleh keterangan. Tidak berlaku penyembunyian atau pemusnahan keterangan, dan oleh itu tiada inferens memudaratkan boleh berbangkit terhadap pendakwaan di bawah s. 114(g) Akta Keterangan 1950. Oleh itu, jawapan kepada (ii) adalah negatif.

(3) Walaupun perintah pindaan secara berkesannya menyebabkan pemadaman "cannabis (Indian Hemp)" di Bahagian III, ia tidak meminda "cannabis" di mana perkataan itu masih dikekalkan dalam kedua-dua Bahagian I dan Bahagian II dan ia masih dadah berbahaya seperti yang ditafsir oleh s. 2 Akta. Keterangan ahli kimia bahawa dadah berkenaan boleh diperihal sebagai "cannabis (Indian Hemp)" atau bahawa Indian Hemp adalah sinonim kepada cannabis telah menyangkal hujah pembelaan bahawa mengedar Indian Hemp bukan satu kesalahan di bawah s. 39B(1)(a) Akta. Fakta bahawa Indian Hemp adalah cannabis atau sinonim dengan cannabis dan *vice*

versa langsung tidak disangsi atau dipertikai oleh pembelaan melalui pemeriksaan balas terhadap ahli kimia. Pemeriksaan balas pembelaan terhadap ahli kimia malah telah menyokong fakta ini. Oleh kerana cannabis secara nyata disenarai di dalam kedua-dua Bahagian I dan Bahagian II dan ia adalah dadah berbahaya di bawah s. 2 Akta, maka perbuatan mengedar cannabis – yang sinonim dengan Indian Hemp – adalah satu kesalahan di bawah s. 39B(1)(a) Akta. Oleh itu, jawapan kepada (iii) adalah berbentuk afirmatif. *PP v. Md Alim Samad* (ditolak); *PP v. Roselang Abdul Rahman* (ditolak); *PP v. Shee Chin Wah* (diikuti).

Case(s) referred to:

Abdullah Zawawi v. PP [1985] 2 MLJ 16 SC ***(refd)***
Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General and others [1993] 2 LRC 279 SC ***(refd)***
Cheak Yoke Thong v. PP [1984] 2 CLJ 83; [1984] 1 CLJ (Rep) 87 FC ***(refd)***
D Bhuvan Mohan Patnaik & Ors v. State of Andhra Pradesh & Ors [1975] 2 SCR 24 ***(refd)***
Goi Ching Ang v. PP [1999] 1 CLJ 829 FC ***(refd)***
Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC ***(refd)***
Hiew Min Chung v. Borneo Housing Mortgage Finance Bhd & Ors [2000] 8 CLJ 165 HC ***(refd)***
Jago v. District Court of New South Wales [1989] 63 ALR 644 ***(refd)***
Kok Wah Kuan v. PP [2007] 4 CLJ 454 CA ***(refd)***
Monie v. Commonwealth of Australia [2005] 63 NSWLR 729 ***(refd)***
Munusamy v. PP [1987] 1 MLJ 492 ***(refd)***
Pang Chee Meng v. PP [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 SC ***(refd)***
PP v. Koh Wah Kuan [2008] 1 MLJ 1 ***(refd)***
PP v. Md Alim Samad [1998] 5 CLJ 590 HC ***(ovrd)***
PP v. Roselang Abdul Rahman (MT1-13-1999) (Unreported) ***(ovrd)***
PP v. Shee Chin Wah [1997] 5 CLJ 472 HC ***(foll)***
Pratt and Anor v. Attorney General for Jamaica and Anor [1993] 4 All ER 769 PC ***(refd)***
R v. Comerford [1998] 1 WLR 191 ***(refd)***
R v. Oliva [1965] 3 All ER 116 CCA ***(refd)***
R v. Russell – Jones [1995] 3 All ER 239 ***(refd)***
Ramanathan Chelliah v. PP [2005] 1 CLJ 858 HC ***(refd)***
Riley v. Attorney General of Jamaica [1982] 3 All ER 469 ***(refd)***
Sher Singh & Ors v. The State of Punjab [1983] 2 SCR 582 ***(refd)***
Sun Kam Heng v. PP [1993] 1 CLJ 109 SC ***(refd)***
Tan Boon Kean v. PP [1995] 4 CLJ 456 FC
Tan Hun Wah v. PP consolidated with Tew He Lay v. PP SCCA No. 107 of 1988 [1994] 1 AMR 113 ***(refd)***

A *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA* ***(refd)***
Teoh Hoe Chye v. PP & Anor Appeal [1987] 1 CLJ 471; [1987] 3 CLJ (Rep) 386 SC ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(dist)***
B *TN Nathan v. PP [1978] 1 MLJ 134* ***(refd)***
TV Vatheeswaran v. State of Tamil Nadu [1983] 2 SCR 348 ***(refd)***
Voon Chin Fatt v. PP [1948-49] MLJ Supp 131 ***(refd)***

Legislation referred to:
Child Act 2001, s. 97(2)
C Dangerous Drugs Act 1952, ss. 2, 37(da), 39B(1)(a)
Dangerous Drugs (Amendment of First Schedule) Order 1996, s. 45A(c)
Evidence Act 1950, ss. 27, 45, 114(g)
Federal Constitution, art. 135(2)

D Constitution of Zimbabwe [Zimb], s. 15(1)
Jamaican Constitution [Jam], s. 17(1)

Other source(s) referred to:
Ross on Crime, 3rd edn, p 1166

E *For the appellants - Hisham Teh Poh Teik; M/s Teh Poh Teik & Co*
For the respondent - Nurulhuda Nuraini Mohd Noor DPP

[Appeal from High Court, Johor Bahru; Criminal Trial No: 45-21-2001]

Reported by Suresh Nathan
F

JUDGMENT

Low Hop Bing JCA:
G

Appeals

[1] The three related appeals for hearing and determination herein are:

H

	Appeal No	Appellant
1.	J-05-7-2007	Ghazalee bin Kassim (appellant 1)
2.	J-05-8-2007	Mohamed Junaidi bin Hussin (appellant 2)
I 3.	J-05-9-2007	Mohd Salleh bin Yunos (appellant 3)

[2] All the appellants were found guilty and convicted by the Johor Bahru High Court ("the trial court") on a charge of trafficking in 50,650gm of cannabis, punishable under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and sentenced to death. Unless otherwise stated, a reference to a section hereinafter is a reference to that section in the Dangerous Drugs Act 1952.

Facts Of The Case

[3] Between 24 and 29 April 2000, ASP Zulkifli bin Ali (PW4), a narcotics officer, received information from his informer, one Ah Meng, concerning the drug trafficking activities of a male Malay named Zali.

[4] In planning to nab the trafficker, PW4 sought assistance, *inter alia*, from Cpl. Ramli b. Saad (PW8) and D/Cpl Mohd Hirbin Othman (PW9), both of Bukit Aman police headquarters, to act as undercover agents. PW8 and PW9 were provided with a Proton Wira car bearing registration No. JDD 5140 ("car No. JDD 5140").

[5] PW4 held a briefing on 26 April 2000 and divided his men into four groups, *viz*:

(1) Group 1, consisting of PW8 and PW9;

(2) Groups 2 and 3, led by Chief Inspector Charun (PW5) and Insp Zamri bin Rasab (PW11) respectively; and

(3) Group 4, in the person of D/Cpl Chew Kooi Hwa (PW10) who acted as an undercover agent cum buyer of the cannabis and was provided with RM70,000.

[6] PW4 booked two rooms *viz* 213 and 228 in the Johor Bahru Lion Hotel for the purpose of the drug transaction.

[7] On 29 April 2000 at about 10 am, upon receiving additional information from Ah Meng, PW4 directed PW8 and PW9 to go to the compound of the Johor Bahru General Post Office ("the post office") followed by PW5 and his men.

[8] In the compound of the post office, appellant 1 approached PW8 and offered to take PW8 to the place where cannabis was kept. Appellant 1 then got into car No. JDD 5140 in which PW9 was at the wheel.

[9] Appellant 1 showed the direction to the Johor Bahru Merlin Inn, while appellant 2 followed in a Kancil car bearing registration No. JFN 1042 ("car No JFN 1042"). PW5 and his men who were near the post office also followed car No. JDD 5140 and car No. JFN 1042.

[10] Upon reaching the basement car park of Merlin Inn, appellant 1 directed PW9 to park car No. JDD 5140 beside Proton Wira car bearing registration No. WFJ 7045 ("car No. WFJ 7045"). Appellant 1 then unlocked the boot of car No. WFJ 7045. There were three bags in the boot. He unzipped one of the bags for both PW8 and PW9 to check, and then asked them to transfer the bags into car No. JDD 5140.

[11] Appellant 1 then proceeded to the driver's seat of car No. WFJ 7045 where he started the ignition and waited therein. PW8 checked the contents of the bags. Upon noticing that PW5 and his men had arrived at the car park, PW8 gave the pre-arranged signal for PW5 to effect the arrest. Appellant 1 was arrested while he was seated in the driver's seat.

[12] Meanwhile, PW5, through a walkie talkie, instructed his men to arrest appellant 2. Appellant 2 was arrested by D/Cpl Mohamad Yassin (PW6) when the former was running towards the lobby of Merlin Inn. PW5 then seized the three bags.

[13] D/Cpl Chew Kooi Hwa (PW10) was in Room 213 of Lion Hotel at about 11.15am on 29 April 2000 when appellant 3 came with Ah Meng who introduced appellant 3 as "Zali" to PW10. Appellant 3, who counted the RM70,000, received two phone calls through his hand phone. In the second call, PW10 heard appellant 3's utterances in an angry tone: "Dahkah belum? Kenapa lambat sangat?" ("Is it done? Why so late?").

[14] After PW10 had handed over the RM70,000 to appellant 3, the latter tried to make more calls through his hand phone but could not get through. Appellant 3 then angrily threw the phone onto the bed.

[15] A short while later, PW11 knocked at the door of Room 213 which PW10 opened. PW11 then arrested appellant 3 who was in the toilet. Together with Ah Meng, PW10 left the room.

[16] All the appellants' act of trafficking in cannabis has been established by direct evidence.

Delay

[17] Learned counsel Mr. Hisham Teh Poh Teik submitted for all the appellants that after having reserved judgment, the trial court's delay of four years and five months in deciding that there was a *prima facie* case has rendered the convictions and sentences unsafe, by reason of the trial judge's loss of audio-visual advantage, omission of crucial issues relevant to the case, and compromise of the appellants' rights to a fair trial. He garnered support from:

(1) *Tan Hun Wah v. PP consolidated* with *Tew He Lay v. PP* SCCA No. 107 of 1988 [1994] 1 AMR 113 SC;

(2) *Monie v. Commonwealth of Australia* [2005] 63 NSWLR 729;

(3) *Cheak Yoke Thong v. PP* [1984] 2 CLJ 83; [1984] 1 CLJ (Rep) 87 FC;

(4) *Goi Ching Ang v. PP* [1999] 1 CLJ 829 FC;

(5) *Jago v. District Court of New South Wales* [1989] 63 ALR 644;

(6) Ross on *Crime* 3rd edn p. 1166; and

(7) *R v. Comerford* [1998] 1 WLR 191 CA.

(8) *Pratt and Anor v. Attorney General for Jamaica and Anor* [1993] 4 All ER 769 PC;

(9) *Riley v. Attorney General of Jamaica* [1982] 3 All ER 469 PC;

(10) *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General and others* [1993] 2 LRC 279 SC;

(11) *D Bhuvan Mohan Patnaik & Ors v. State of Andhra Pradesh & Ors* [1975] 2 SCR 24;

(12) *Sher Singh & Ors v. The State of Punjab* [1983] 2 SCR 582;

(13) *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan* [1996] 2 CLJ 771 CA.

(14) *Voon Chin Fatt v. PP* [1948-49] MLJ Supp 131 HC;

(15) *T.N. Nathan v. PP* [1978] 1 MLJ 134 HC;

(16) *Hiew Min Chung v. Borneo Housing Mortgage Finance Bhd & Ors* [2000] 8 CLJ 165 HC;

(17) *Ramanathan Chelliah v. PP* [2005] 1 CLJ 858 HC;

(18) *Teoh Hoe Chye v. PP & Anor Appeal* [1987] 1 CLJ 471; [1987] CLJ (Rep) 386 SC;

(19) *Sun Kam Heng v. PP* [1993] 1 CLJ 109 SC; and

(20) *Kok Wah Kuan v. PP* [2007] 4 CLJ 454 CA.

[18] Learned deputy public prosecutor Ms. Nurulhuda Nuraini binti Mohd Nor responded that the delay does not automatically vitiate the convictions and sentences.

[19] I am of the view that the aforesaid submissions give rise to the following question for determination:

> Where there is a lapse of four years and five months from the date the trial court has reserved judgment at the close of the prosecution's case to the date of finding a *prima facie* case, can the delay *per se* be construed as having rendered unsafe the convictions and sentences arrived at by the trial court after the close of the defence case?.

[20] The proper perspective is reflected in the chronology of events in the trial court as follows:

DATE	PROCEEDINGS
10 April 2002	Trial commenced
22 May 2002	Prosecution closed its case
2 July 2002	Prosecution and defence concluded their submissions. Trial court reserved judgment.
18 December 2006	Trial court found *prima facie* case and called for defence. All appellants gave their respective statement from the dock.
9 January 2007	All appellants were convicted as charged and sentenced to death.
11 January 2007	All appellants filed notice of appeal
3 September 2007	Learned trial judge signed the grounds of judgment.

[21] The plethora of authorities cited for the defence covered a wide variety of issues, including those in which no delay was raised; and where delays were ventilated, the delays may be further categorised.

[22] To achieve brevity, I shall tabulate several unsupportive authorities which do not concern any form of delay, as follows:

Authority	Issue
(1) *Cheak Yoke Thong, supra*	The Federal Court dealt with the recusal of the trial magistrate.
(2) *Goi Ching Ang, supra*	The Federal Court considered s. 27 of the Evidence Act 1950.
(3) *R v. Comerford, supra* (referred to in Ross on Crime)	Jury protection was raised.
(4) *D. Bhuvan Mohan Patnaik & Ors, supra*	The petitioners' failure to obtain an order for the removal of armed police guard posted around the jail and the dismantle of live wire electrical mechanism fixed on top of the jail wall.
(5) *Tan Teck Seng, supra*	A reasonable opportunity of being heard pursuant to art 135(2) of the Federal Constitution.
(6) *Teo Hoe Chye, supra*	Whether there was a serious gap in the prosecution's case.
(7) *Sun Kam Heng, supra*	The Supreme Court upheld the defence attack on the break in the chain of evidence.
(8) *Kok Wah Kuan, supra*	The Court of Appeal decided on s. 97(2) of the Child Act 2001. Incidentally, this decision has been overruled by the Federal Court in *PP v. Koh Wah Kuan* [2008] 1 MLJ 1.

[23] The other authorities cited for the defence illustrate the following catagories of delay:

(1) Prosecution's delay in bringing an indictment. This has not been tested in our courts, but was raised in *Jago, supra*. There, the High Court of Australia dismissed the defence application for permanent stay of prosecution, and insisted that there must be actual prejudice or unfairness and not merely on "presumptive prejudice", as permanent stay should be ordered only in an extreme case but not on the basis of delay alone;

(2) Prolonged delay in carrying out the execution of death sentence. To date, in Malaysia, this has not become the subject matter of judicial hearing and determination. It has nevertheless been raised in other jurisdictions, eg,:

(a) In Jamaica and Zimbabwe, the accused were successful in persuading the Privy Council and the Supreme Court of Zimbabwe respectively to commute a death sentence to life imprisonment, on the ground that the accused has discharged the burden of proving that the prolonged delay amounted to inhuman and degrading punishment contrary to s. 17(1) of the Jamaican Constitution, as in *Pratt & Anor, supra,* after referring to *Riley, supra,* and, contrary to s. 15(1) of the Constitution of Zimbabwe as in Catholic Commission for Justice and Peace in *Zimbabwe, supra,*

(b) However, in *Sher Singh & Ors, supra,* the Supreme Court of India overruled an earlier decision in *T.V. Vatheeswaran v. State of Tamil Nadu* [1983] 2 SCR 348 and held that a death sentence cannot be vacated merely because of a two-year delay in carrying out the execution thereof;

(3) Delay in writing or supplying grounds of judgment after the accused has filed a notice of appeal. Our courts have held that this category of delay *per se* cannot be construed as vitiating a conviction and sentence; it is necessary for an accused to discharge the burden of proving error or errors on the part of the court eg,:

(a) Prejudice due to:

(i) an omission to state something in the grounds which might have been favourable to the accused, as in *Voon Chin Fatt, supra,* where the conviction and sentence were quashed as a result of such omission; or

(ii) acting on the uncorroborated evidence of an accomplice in a corruption trial, as in *T.N. Nathan, supra,* where the conviction and sentence were set aside;

(b) Failure to assess the credibility of witnesses and misdirection on the standard of proof, as in *Hiew Min Yong, supra,* where the conviction and sentence were quashed;

(c) Misdirection on the standard of proof (enunciated in *Tan Boon Kean v. PP* [1995] 4 CLJ 456) as in *Ramanathan, supra,* where the conviction and sentence were set aside; and

(d) Fatal omission to ask whether the defence had, on a balance of probabilities, rebutted the presumption of trafficking under s. 37(da), as in *Tan Hun Wah, supra,* where the conviction for drug trafficking under s. 39B(1)(a) was quashed and substituted with a conviction for possession thereof. However, the Supreme Court stressed that not every form of delay should result in vitiating the whole proceedings.

(4) Delay in delivering a reserved judgment (or, in Latin, c.a.v. = *curia advisari vult*). In my view, only this specific category of delay carries a close connection with and is of direct relevance to the type of delay under consideration in the instant appeal.

[24] By way of elaboration, in *Monie, supra,* which was referred to in Ross on *Crime* p. 404 para 4.1150, *supra,* the trial judge had reserved judgment and taken 18 months to deliver it after many false starts. Hunt AJA held, *inter alia,* that delay between taking evidence and the delivery of judgment does not, in itself, justify upholding an appeal against the judgment given, as error must still be established on the part of the trial judge.

[25] In Malaysia, the above question for determination is arguably the first of its kind to be tested in our courts.

[26] Upon a proper perusal of the appeal record, it needs to be noted that the learned trial judge's grounds of judgment leading to the finding of a *prima facie* case cover a total of 63 pages *viz* from pp. 124 to 187, and embrace a maximum evaluation and appreciation of the evidence adduced right up to the close of the prosecution's case. There is also a detailed discussion on the opening statement, the chemist's testimony and analysis, the law of drug trafficking, the burden and standard of proof, the defence contention as to whether the exhibits in question were cannabis as defined in s. 2, whether it was an offence under s. 39B(1)(a), and the various roles undertaken by the appellants in the entire episode as revealed in the evidence of prosecution witnesses. In reality, the trial court's maximum evaluation and appreciation of prosecution evidence signifies an embarkation on a meticulous exercise in the consideration process before arriving at the finding that there was a *prima facie* case for the appellants to answer.

[27] Further, I am unable to come to a finding that the learned trial judge had occasioned any loss of audio-visual advantage, nor was there any omission on his part to consider crucial issues relevant to the case; less so any compromise of the appellants' rights to a fair trial.

[28] In the circumstances, I hold that there is no merit in the defence contention. The answer to the above question is in the negative.

Failure To Call Ah Meng

[29] The defence advocated that the prosecution's failure, to call Ah Meng or to offer him to the defence for cross-examination, has prejudiced the appellants and is fatal. Reference was made to:

(1) *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1 SC;

(2) *Abdullah Zawawi v. PP* [1985] 2 MLJ 16 SC;

(3) *R v. Russell – Jones* [1995] 3 All ER 239 CA;

(4) *Pang Chee Meng v. PP* [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 SC; and

(5) *Gooi Loo Seng v. PP* [1993] 3 CLJ 1 SC.

[30] In response, the prosecution argued that:

(1) apart from introducing appellant 3 to PW10, Ah Meng did not play any active role; and

(2) an attempt to trace Ah Meng had proved unsuccessful, in which case there was no suppression of evidence, thereby rendering the presumption under s. 114(g) of the Evidence Act 1950 inapplicable. Support was sought in:

(a) *Munusamy v. PP* [1987] 1 MLJ 492 SC; and

(b) *Ti Chuee Hiang, supra.*

[31] The trial court found that:

(1) it was the defence seeking to cast Ah Meng as an agent provocateur, but there was no evidence that Ah Meng was other than an informer; and

(2) there was unchallenged evidence that Ah Meng was not available after the attempt to trace him had turned futile.

[32] Under this head, the question that arises for determination is:

> Is the failure to call the informer fatal to the case for the prosecution?

[33] I would first analyse three defence authorities which apparently concern different issues.

[34] First, in *Abdullah Zawawi, supra,* the accused was acquitted on appeal to the Supreme Court because the prosecution had fallen short of proving a *prima facie* case.

[35] Then, in *Pang Chee Meng, supra,* the Supreme Court had allowed the accused's appeal against conviction and sentence under s. 39B(1) because:

(1) The police evidence under s. 27 of the Evidence Act 1950 was unsatisfactory and has created a lurking doubt on the thoroughness of police investigation;

(2) The trial judge had erroneously directed himself on the principles to be applied in determining issues of fact and law; and had adopted a wrong approach in regard to the burden

of proof and seemed to expect a higher standard of proof from the defence than that of creating a reasonable doubt; and

(3) In the accused's cautioned statement, he stated that there were three others sharing the room from which the dangerous drug was found.

[36] The third authority is *Gooi Loo Seng, supra,* where the accused, his girlfriend and her friends could have access to the room occupied by the accused and his girlfriend. The contents of the search list told a materially different story from the evidence of the officer in charge. The trial judge did not view the entire evidence objectively, and so on appeal, the conviction and sentence were set aside.

[37] Hence, with the utmost respect, I am of the view that *Abdullah Zawawi, supra, Pang Chee Meng, supra,* and *Gooi Loo Seng, supra,* are unhelpful to the defence.

[38] In *Ti Chuee Hiang, supra,* a team of policemen had planned and organized a trap to arrest a drug dealer who was the accused there. A policeman posed as a heroin buyer. A meeting with the accused was arranged through the help of a police informer. Negotiations between the accused and the police for the sale of heroin, which ended as a concluded deal, was carried out. The accused was arrested when he was delivering heroin to the police. To a charge of drug trafficking under s. 39B(1)(a), the accused's defence that he was an innocent carrier was rejected by the trial judge. On appeal, the accused cited miscarriage of justice in that the prosecution had failed to either call as a witness, or at least make available to the defence for cross-examination, the informer who had assumed the role of an agent provocateur. The Supreme Court speaking through Edgar Joseph Jr SCJ (as he then was) held, *inter alia*, that:

(1) in the informer's default, the prosecution had failed in its obligation to explain why they were unable to call him; and

(2) although the defence had criticized the prosecution for failing to call the informer, the trial judge did not direct his attention to this point at all, and so there was a serious misdirection by way of non-direction occasioning a miscarriage of justice.

[39] *Ti Chuee Hiang, supra,* made extensive reference to the judgment of Lord Parker CJ in *R v. Oliva* [1965] 3 All ER 116 CCA, which was also applied in *Russell-Jones, supra.* These two English Court of Criminal Appeal judgments had established seven rules of practice, one of which is that prosecutorial discretion to call any witness must be exercised in the interest of justice, so as to promote a fair trial. It was also cautioned that what has been said of the rules of practice should not be regarded as a lexicon or rule book to cover all cases in which a prosecutor is called upon to exercise this discretion. There may be special situations; and in every case, the judgment to be made is primarily that of the prosecutor, and, in general, the court will only interfere with it if he has gone wrong in principle.

[40] In the instant appeal, the trial court has arrived at the correct finding that Ah Meng was a mere informer and not an agent provocateur. The trial court has also carefully considered the defence contention in this regard. I am unable to find any non-direction on the part of the trial court and so there is no miscarriage of justice at the trial. In the circumstances, *Ti Chuee Hiang, supra,* is readily distinguishable.

[41] In Malaysia, s. 114(g) of the Evidence Act 1950 provides that the court may presume the existence of certain facts and that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it. However, this adverse inference can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence: per Mohamed Azmi SCJ (as he then was) in *Munusamy, supra.*

[42] The unchallenged evidence adduced in the trial court reveals that the prosecution has made an attempt to bring Ah Meng to court as a witness but it was a fruitless exercise. The prosecution has merely failed to obtain evidence. There is no withholding or suppression of evidence. Hence, no adverse inference can be invoked against the prosecution under s. 114(g).

[43] I therefore do not feel able to sustain the defence contention herein. The answer to the above question is in the negative.

A **Cannabis**

[44] Although PW3 (the chemist) did testify that the drug in question was cannabis as defined in s. 2, he conceded under cross-examination that the drug could be described as "cannabis
B (Indian Hemp)". The defence referred to the Dangerous Drugs (Amendment of First Schedule) Order 1996 ("the amendment order") in which the Minister of Health acting under s. 45A(c) had deleted, *inter alia*, "cannabis (Indian Hemp)" from Part III of the First Schedule with effect from 12 April 1996, and submitted that,
C as a result, the appellants, who were arrested on 29 April 2000 for trafficking in cannabis, had committed no offence, on the basis of *PP v. Md Alim bin Samad* [1998] 1 MLJ 260 HC, and *PP v. Roselang Abdul Rahman* (Johor Bahru High Court MT1-13-1999) (unreported).

D **[45]** In supporting the decision of the trial court, the prosecution adhered to the chemist's evidence that the drug in question was cannabis as defined in s. 2, and relied on *PP v. Shee Chin Wah* [1997] 5 CLJ 472 HC.

E **[46]** The trial court held that:

(1) there is no doubt that the chemist had in mind cannabis as defined in s. 2;

F (2) the chemist's answer that "Indian Hemp" is a synonym or common name for cannabis is precisely that only; and

(3) the material the chemist examined has the physical and chemical properties of cannabis as defined in s. 2.

G **[47]** Under this head, the question for determination is:

> Pursuant to the amendment order, is it still an offence under s. 39B(1)(a) to traffick in cannabis when cannabis is synonymous with Indian Hemp?

H **[48]** An analysis of the aforesaid authorities would be enlightening.

[49] In *Md Alim bin Samad, supra,* the same question was canvassed. There, the chemist testified that the drug was cannabis as defined in s. 2, but under cross-examination, he asserted that he could
I not deny that the drug was Indian Hemp. In acquitting the accused without calling for defence, Abdul Malik Ishak J (now JCA), at p. 278 E to F held that:

(1) there is no ambiguity in the amendment order;

(2) there is only one construction and that construction favours the liberty of the accused;

(3) the sting of 'cannabis (Indian Hemp)' as a dangerous drug has been taken away; and

(4) the purported cannabis in which the accused was said to have trafficked was indeed Indian Hemp, and so the accused had not committed any offence known to law.

[50] *Md Alim bin Samad, supra,* was applied in *Roselang, supra,* where the chemist confirmed in cross-examination that the drug in question can also be described as "Cannabis (Indian Hemp)". Syed Ahmad Helmy J shared the same sentiment as in *Md Alim Samad, supra.*

[51] However, *Md Alim Samad, supra,* and *Roselang, supra,* were not followed in *Shee Chin Wah, supra,* where the same issue required determination. The chemist said that:

(1) he would not describe the cannabis recovered from the accused within bracket as Indian Hemp; and

(2) Indian Hemp is one of the common names for cannabis in other countries; it means one and the same thing ie dangerous drug under s. 2.

[52] Suriyadi J (now JCA) dismissed the defence submission and held that:

(1) the drug is cannabis under s. 2 and the charge of trafficking in cannabis is valid; and

(2) the First Schedule consists of five Parts, wherein both Part I and Part II still retain the drug of cannabis.

[53] In view of the aforesaid diametrically opposite decisions of different branches of the High Court, two each on both sides of the divide, it is imperative for this Court to determine which view is to be affirmed.

[54] In reverting to the instant appeal, it is to be noted that the chemist's evidence, that the drug in question is cannabis within the meaning of s. 2, was given as an expert under s. 45 of the

Evidence Act 1950 ie being a person skilled in science and is a relevant fact which the trial court must consider. It has indeed been correctly considered and accepted by the trial court.

[55] The First Schedule was referred to in s. 2 which in turn defines "dangerous drug" as "any drug or substance which is for the time being comprised in the First Schedule". Section 2 also defines "cannabis" as "any part of any plant of the genus cannabis from which there is found to be present resin irrespective of its quantity, and by whatever name the plant may be designated."

[56] "Cannabis" is listed in both Part I and Part II of the First Schedule. Prior to the amendment order, Part III contained, *inter alia*, "Cannabis (Indian Hemp)". The amendment order in effect brings about the deletion of "Cannabis (Indian Hemp)" in Part III. However, the amendment order keeps "cannabis" intact as it is retained in both Part I and Part II and it is dangerous drug as defined in s. 2.

[57] The chemist's evidence that the drug in question can be described as "Cannabis (Indian Hemp)" or that Indian Hemp is a synonym of cannabis has in effect negated the defence contention that trafficking in Indian Hemp is not an offence under s. 39B(1)(a). The effect of the chemist's evidence is that cannabis and Indian Hemp are terms which may be used interchangeably, so that trafficking in cannabis or its synonym "Indian Hemp" comes squarely within the ambit of the term "cannabis" expressly retained in both Part I and Part II and is dangerous drug under s. 2. The fact that Indian Hemp is cannabis or is synonymous with cannabis and *vice versa* has neither been doubted nor disputed by the defence at all. Indeed, it has been assiduously advanced for the defence by way of cross-examination of the chemist.

[58] With the utmost respect, the defence contention raised and accepted in *Md Alim Samad, supra*, and *Roselang supra,* demonstrates an inherent oversight in that there is an error in failing to consider both Part I and Part II, wherein the existence of cannabis remains unaffected notwithstanding the amendment order. As cannabis has been expressly listed in both Part I and Part II and is dangerous drug as defined in s. 2, the act of trafficking in cannabis which is synonymous with Indian Hemp clearly constitutes an offence under s. 39B(1)(a) with which the appellants have been charged.

[59] In the circumstances, I am constrained to hold that *Md Alim Samad, supra,* and *Roselang, supra,* had been wrongly decided and are hereby overruled. The decisions in *Shee Chin Wah, supra,* and in the trial court are correct. Hence, the answer to the above question is in the affirmative.

Conclusion

[60] On the foregoing grounds, the appellants' appeals are dismissed and the convictions and sentences of the trial court are hereby affirmed.

[61] My learned brother, Raus bin Sharif, JCA and my learned sister Zainun binti Ali, JCA have read this judgment in draft and have expressed their agreement to make it the judgment of the court.